**UNITED STATES BANKRUPTCY COURT**
**NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVISION**

| **IN THE MATTER OF:** | **CASE NUMBERS** |
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| PAMELA DENISE PARKER,<br><br>Debtor, | BANKRUPTCY CASE<br>NO. A02-69747-MGD |
| WILSON & ASSOCIATES, ATTORNEYS, P.C.,<br><br>Plaintiff,<br>v.<br><br>PAMELA D. PARKER,<br><br>Defendant. | ADVERSARY CASE<br>NO. 03-09029<br><br>IN PROCEEDINGS UNDER<br>CHAPTER 7 OF THE<br>BANKRUPTCY CODE |

**ORDER DENYING DEBTOR'S MOTION TO VACATE JUDGMENT**

This adversary proceeding is before the Court on Pamela D. Parker's ("Debtor") Motion to Vacate Judgment ("Motion to Vacate") (Adversary Docket No. 141). Debtor filed the motion to vacate *pro se* notwithstanding that she is represented by an attorney in this case. Wilson & Associates, Attorneys, P.C., ("Plaintiff"), which is represented by two separate attorneys, filed two separate responses in opposition to Debtor's Motion to Vacate (Adversary Docket Nos. 142 and 144). Subsequently, Debtor, now through her attorney, filed a Supplemental Memorandum in support of her Motion to Vacate. (Adversary Docket No. 145). Plaintiff filed a response to the Supplemental Memorandum. (Adversary Docket No. 147). The Court has reviewed Debtor's Motion to Vacate, Plaintiff's responses, and the entire record in the case, and it has determined that a hearing is not necessary to resolve the matter. For the reasons set forth below, Debtor's Motion to Vacate Judgment is hereby ***denied***.

The record in this matter is replete with discovery and procedural squabbles that have impeded any substantive analysis of the legal matters asserted in the Complaint (Adversary

Docket No. 1). A review of the docket reveals numerous motions for sanctions, motions to compel, and motions for protective orders, that have wasted the time and resources for all involved in this case. The Court, tired of continuously refereeing discovery disputes, eventually resorted to requiring the parties to be file monthly joint status reports.

Notwithstanding the fact that the parties have demonstrated an inability to cooperate with each other, the facts in the case appear to be straightforward. Debtor engaged in a transaction to refinance her home mortgage. Plaintiff, acting as the closing attorney on behalf of the lender, prepared a check for the loan proceeds and presented the check to Debtor. The amount of the check exceeded the amount of the loan by approximately $28,000. At some point, the Plaintiff requested that the Debtor return the $28,000, and Debtor declined. Plaintiff initiated a state court lawsuit against Debtor to recover the funds. Subsequently, on August 30, 2002, Debtor filed a chapter 7 petition in this Court.

This adversary proceeding was commenced on February 3, 2003 when Plaintiff filed a multi-count complaint seeking to deny Debtor's discharge pursuant to 11 U.S.C. §§ 727(a)(2) - (a)(5), or alternatively sought to have the Court determine that the debt owed by Debtor to Plaintiff to be non-dischargeable pursuant to 11 U.S.C. §§ 523(a)(2), (a)(4) and (a)(6). On March 5, 2003, Debtor, at the time *pro se*, filed her first Answer (Adversary Docket No. 6) to the Complaint.

In this Order, the Court will not set forth in detail the history of the various discovery disputes. However, it is important to note that Debtor's professed inability to retain local counsel has doubtlessly served to amplify the difficulties with communication between the parties. When Debtor filed her Chapter 7 petition, she was represented by Kaiden of Kaiden, LLC. The Kaidens' representation of Debtor appears, for the most part, to have been strictly limited to the main chapter 7 case, as Debtor first filed the answer in the adversary proceeding *pro se*.[1] Debtor then sought to be represented by Robert R. Parker, Jr., a resident of California

[1]The Kaidens were specifically designated local counsel pursuant to the *pro hac vice* application for Florence A. Bowens. However, pursuant to a certificate of consent order under BLR 9010-2(b)(4), filed on August 6, 2004, the Kaidens, and Kaiden & Kaiden, LLC, no longer

and her former husband, who while a law school graduate, is not currently licensed to practice law. On July 21, 2003, after the filing of a battery of adversarial pleadings regarding the propriety of having Mr. Parker serve as Debtor's representative in the case, the Court entered an Order which denied Debtor's attempt to have Mr. Parker assist her in this proceeding.

On September 15, 2003, the Court approved the *pro hac vice* application submitted by Florence A. Bowens, an attorney based in Durham, North Carolina. Despite the fact that Ms. Bowens maintains her office in North Carolina and is not admitted to practice law in Georgia, she has continued to serve as counsel for Debtor with no apparent limits upon her authority made known to the Court. While the Court implored Debtor and Ms. Bowens to engage local counsel as required by the local rules, Debtor claimed to be unable to obtain a Georgia lawyer to participate in this litigation.[2]

The appearance of Ms. Bowens as counsel for Debtor did not facilitate cooperation or communication between the parties and the case continued to proceed on its adversarial track. On February 25, 2004, the case was reassigned to the undersigned bankruptcy judge.[3] As mentioned above, to encourage efforts toward a decision on the merits, the Court mandated monthly joint status reports.

On May 6, 2005, the Court entered an Order following a May 2, 2005 hearing on a motion for sanctions.[4] The Order directed that the Debtor's deposition would be recommenced on May 16, 2005, at a conference room adjacent to the chambers of the undersigned.[5] On May

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represented Debtor in any capacity for the remainder of the adversary proceeding.

[2]See the Court's Order entered October 13, 2004.

[3]The case was originally assigned to the Honorable W. Homer Drake, Jr.

[4]The basis for Plaintiff's motion for sanctions was its inability to obtain the cooperation of Debtor's sister for purposes of conducting a deposition. At the hearing it was revealed to the Court that Debtor's deposition had not been completed. The May 6, 2005 Order addressed the date, time and place for the completion of both depositions.

[5]Per the agreement of the parties, the date was changed to May 20, 2005.

20, 2005, Debtor's deposition was suspended prior to completion when the parties began discussing a resolution of the matter. A settlement was reached, and, with Debtor, her counsel and Plaintiff's counsel in attendance, the terms of the settlement were placed on the record. The settlement had two components. The first was the entry of a consent judgment for $32,000 ("Consent Judgment"), plus eight percent interest and costs, non-dischargeable in Debtor's bankruptcy proceeding. The second part of the arrangement was an agreement providing for a detailed payment schedule which allowed for significant discounts for Debtor if she were to pay the judgment amount in certain time frames. It was also agreed that the discharge counts and Debtor's counterclaims would be dismissed with prejudice.

The transcript of the deposition (attached as Exhibit "A" to Plaintiff's Response Brief in opposition to Debtor's Motion to Vacate) reveals that all parties present agreed on the record that the settlement terms as announced by counsel for Plaintiff was accurate. Debtor herself did not speak. Her counsel spoke on her behalf, and Debtor did not disagree or question what was said. Counsel for Plaintiff then circulated a letter on May 25, 2005 memorializing the terms of the agreement. Aware that the parties had reached a settlement of the matter,[6] but still awaiting the Consent Judgment, the Court scheduled a status conference to be conducted telephonically on June 17, 2005. At the telephonic conference,[7] Ms. Bowens informed the Court that there was no dispute as to the settlement of this matter, that she herself had signed the Consent Judgment, but that Debtor now wanted the documents to be reviewed by a Georgia lawyer. Following the status conference, the attorneys executed the Consent Judgment for entry in the adversary proceeding. Ms. Bowens indicated she would endeavor to arrange for Debtor to promptly sign the Settlement Agreement which details the payment schedule and discounts. The consent judgment was entered on June 17, 2005 and on June 27, 2005, Debtor

[6]After the parties had recited the terms of the settlement at the May 20, 2005 deposition, Mr. Matthew McCoyd, one of Plaintiff's attorneys, informed Court's staff that the matter was settled and that a Consent Judgment would be submitted.

[7]A transcript of which is attached to Plaintiff's brief in opposition to Debtor's Motion to Vacate as Exhibit "H."

filed the Motion to Vacate that is presently before the Court.

The Motion to Vacate is predicated upon the Debtor's contention that she did not agree to the settlement of the matter, the terms and conditions of which were announced at the deposition on May 20, 2005, and later re-stated in the letter agreement circulated among the respective counsel of the parties. Debtor asserts that Ms. Bowens did not have the necessary authority to agree to the terms and conditions that constituted the Settlement Agreement. Plaintiffs, in their responses to Debtor's Motion to Vacate, counter that Debtor and her counsel clearly and unambiguously agreed to the terms of the settlement recited at the deposition and that the announced terms were accurately memorialized in the May 25, 2005 letter agreement circulated among the parties. The gravamen of Plaintiff's response is that the statements made by Ms. Bowens at the June 17, 2005 status conference held by the Court, her signature on the May 25, 2005 letter and her signature on the June 17, 2005 Consent Order and Judgment are consistent with the fact that all parties were in agreement with the settlement of the case.

While Debtor's *pro se* Motion to Vacate and the Supplemental Memorandum filed by her attorney does not explicitly state the grounds upon which Debtor is relying, the Court presumes that Debtor relies upon Rule 60 of the FEDERAL RULES OF CIVIL PROCEDURE in attempting to vacate the Consent Judgment. Fed.R.Civ.P. 60(b), made applicable to bankruptcy proceedings pursuant to Fed.R.Bankr.P. 9024, provides the basis for which a party can seek relief from a judgment or order. Rule 60(b) expressly provides for relief from a judgment or order due to mistake or inadvertence, and provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of judgment....

Rule 60(b) is not a substitute for an appeal, and relief under the rule may only be granted upon an adequate showing of exceptional circumstances. *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989); *Richards v. Aramark Servs., Inc.*, 108 F.3d 925, 927 (8th Cir. 1997); *Nemaizer v. Baker*, 793 F.2d 58, 61 (2nd Cir. 1986); *DiVito v. Fidelity and Deposit Company of Maryland*, 361 F.2d 936 (7th Cir. 1966). The role of Rule 60(b) is to strike a balance between serving the ends of justice and preserving the finality of judgments. As a result it should be broadly construed to do substantial justice, yet final judgments should not be lightly re-opened *Larsen Co. v. Consolidated Marketing, Inc.*, 148 F.R.D. 664, 666 (N.D.Ga. 1993) *citing Nemaizer*, 793 F.2d. at 61. The burden to obtain Rule 60(b) relief is heavier when the parties have consented to a settlement of the matter as opposed to when one party proceeded to trial, lost and did not appeal. *Nemaizer*, 793 F.2d. at 63; *Hoffman v. Celebrezze*, 405 F.2d 833, 836 (8th Cir. 1969). The movant bears the significant burden of demonstrating that one of the grounds set forth in Rule 60(b) exists, and the determination as to whether to allow application of the rule is within the sound discretion of the presiding court. *In re Michael*, 285 B.R. 553, 554-555 (Bankr. S.D.Ga. 2002).

As a general rule, Courts are reluctant to attribute to a client the mistakes of their attorney and therefore, upon proper showing, even consent judgments may be set aside under Rule 60(b). *In re Slomnicki*, 243 B.R. 644, 655 (Bankr. W.D.Pa. 2000) (*citing Smith v. Widman Trucking & Excavating, Inc.*, 627 F.2d 792, 795-796 (7th Cir. 1980). "In particular, a consent judgment shown to have been entered without express authority from the client or without the client's actual consent may be the subject of Rule 60(b) relief." *Id.*

Motions under Rule 60(b)(1), premised upon the grounds of mistake, are intended to provide relief from litigation mistakes that a party could not have protected against, such as an attorney acting without the authority of the client. *Yapp v. Excel Corp.*, 186 F.3d 1222, 1231 (10th Cir. 1999). The other grounds for relief under Rule 60(b)(2-6) are not relevant to the relief requested by Debtor. Debtor is not seeking to vacate the Court's Order on the basis of: (i) newly discovered evidence; (ii) fraud, misrepresentation or misconduct by the adverse party; (iii) that the judgment is void; or (iv) that the judgment has been satisfied or released. As for

the "catch-all" provision of Rule 60(b)(6), it may only be invoked as for causes not covered by another clause specifically enumerated in Rule 60(b)(1-5), otherwise Rule 60(b)(6) would render the one year limitation applicable to Rule 60(b)(1)-(5) meaningless. *Plotner v. AT & T Corp.*, 224 F.3d 1161, 1174 (10th Cir. 2000). Accordingly, the Court need focus only on Rule 60(b)(1).

The Court finds no basis to vacate the Consent Judgment predicated upon an alleged mistake due to the fact that there was no mistake: the judgment would stand under Georgia law. In *Ford v. Citizens and Southern Nat. Bank, Cartersville*, 928 F.2d 1118 (11th Cir. 1991), the Eleventh Circuit referenced the applicable Georgia law on the subject: "[A]n attorney is cloaked with apparent authority to enter into a binding agreement on behalf of a client. The client is therefore bound by his attorney's agreement to settle a lawsuit, even though the attorney may not have had express authority to settle, if the opposing party was unaware of any limitation on the attorney's apparent authority." *Ford,* 928 F.2d at 1120 [*citing Glazer v. J.C. Bradford & Co.*, 616 F.2d 167, 168 (5th Cir. 1980)]. Under Georgia law, an attorney's consent to settlement is binding on the client unless the other parties were aware that the attorney's authority was limited. *Id.* at 1121 (*citing Glazer,* 616 F.2d at 168). *Also see Brumbelow v. Northern Propane Gas Co.*, 251 Ga. 674, 675, 308 S.E.2d 544 (1983).

In *Hayes v. National Service Industries*, 196 F.3d 1252 (11th Cir. 1999), the Eleventh Circuit affirmed decisions from the District and Magistrate Courts enforcing a settlement agreement reached in an employment discrimination suit, entered into by an attorney without her client's consent. One of the questions before the Eleventh Circuit was whether to rely upon state or federal common law principles in determining whether the settlement should be enforced. The Magistrate and District Courts both determined that as long as the attorney had apparent authority, that would be sufficient under Georgia law. The Eleventh Circuit agreed, stating that even though the underlying lawsuit was one under federal law, one should look to state law principles in reviewing the scope of an attorney's authority to enter into a settlement agreement. *Also see Resnick v. Uccello Immobilien GMBH, Inc.*, 227 F.3d 1347, 1350 (11th Cir. 2000), and *Tidwell v. A & M Check Cashing, Inc. (In re Arrington)*, 293 B.R. 76, 79-80

(Bankr. M.D.Ga. 2003). "An attorney of record is the client's agent in pursuing a cause of action and under Georgia law 'an act of an agent within the scope of his apparent authority binds the principal.' The attorney's authority is determined by the representation agreement between the client and the attorney and any instructions given by the client, and that authority may be considered plenary unless it is limited by the client and that limitation is communicated to opposing parties." *Hayes,* 196 F.3d at 1254 (*citing Brumbelow,* 251 Ga. at 675). The Eleventh Circuit held that Hayes was bound by her attorney's agreement to settle the lawsuit even if that attorney did not have express authority to settle, provided the opposing party was unaware of any limitation on the attorney's apparent authority.

In the supplemental memorandum filed by Ms. Bowens in support of the Motion to Vacate, great emphasis is placed on a decision by the Georgia Court of Appeals, *Lewis v. Uselton*, 202 Ga. App. 875, 416 S.E.2d 94 *cert. denied*, 202 Ga.App. 905, 416 S.E.2d 94 (1992). In *Uselton* an attorney brought an action against his clients seeking to be compensated based upon a contingent fee agreement entered into between the parties. The clients asserted that the attorney settled their pending personal injury matter for an amount that was significantly less than the amount expressly authorized by them, and as a result, he was not entitled to the contingent fee. *Id.* The question before the court was whether the settlement was authorized pursuant to the specific or special authority allegedly given to the attorney based upon the ambiguous terms in the pertinent employment contract, so as to relieve him of liability to his clients for professional malpractice and allow him to collect the fee. *Id.* In affirming the trial court's denial of the attorney's motion for summary judgment the Georgia Court of Appeals focused on O.C.G.A. § 15-19-6 and the special authority required for an attorney to settle a client's claim. *Id.* At 878. The Georgia Court of Appeals held that an attorney can obtain the requisite special authority only by conveying and subsequently obtaining the approval of the client as to specific concrete offers. *Id*. at 878-79.

The *Uselton* does not dispositive in resolving the matter at hand. Firstly, *Uselton* involved an action between an attorney and his clients, which ultimately addressed the scope of his authority as it related to *their* relationship. The court stated:

> "Prior to *Brumbelow*, when an attorney asserted reliance on another's "apparent" authority, he did so at peril; there was no presumption of such authority and the burden of proof was on the attorney seeking to enforce the settlement.... The same reasoning applies today where an attorney asserts such authority *as against his own client*. Although *Brumbelow* allows opposing counsel to rely on an "apparent" plenary authority to settle, it does not create a presumption *as against the client* that any such authority existed. Therefore, the burden is on the attorney who asserts this right against his client to prove it unequivocally."

*Id*. at 879 (emphasis in original).

Most importantly, unlike the clients in *Uselton*, Debtor was not in the dark as to the details of the settlement. Debtor was present when the specific terms of the settlement were announced at the deposition. She was provided with a copy of the letter that memorialized the agreement. At no point did she state to Plaintiff's counsel that Ms. Bowens lacked the authority to agree to the stated terms of the agreement. At no point did Ms. Bowens announce, either at the deposition or during a status conference held before the undersigned on June 17, 2005, that she did not have the authority to sign the agreement. There is nothing in the record of this case to suggest that Ms. Bowens was not operating with full authority to settle the matter at hand. The transcript of the deposition and the telephonic conference held by the Court indicate that Plaintiff's counsel conducted the settlement of the case as if Ms. Bowens had total authority to resolve the matter.

This is not a situation where Ms. Bowens lacked the appropriate authority to execute the Consent Judgment that Debtor now hopes to vacate. The facts of the case suggest that this is merely a situation where the Debtor is having second thoughts about the Settlement Agreement. The record reveals no evidence that there was not a meeting of the minds as to the substance of the agreement. The transcript of the deposition and the status conference held before the Court are consistent and clear. There is no mistake. Debtor is merely trying to change her mind, which is not a sufficient basis to vacate a judgment. The exceptional

circumstances necessary for a Court to grant a motion under Rule 60 are not present.[8] Accordingly, it is

**ORDERED** that Debtor's Motion to Vacate the Judgment is **DENIED**.

The Clerk is directed to mail a copy of the Order to the parties listed on the attached distribution list.

**IT IS SO ORDERED**.

At Atlanta, Georgia, this the _____day of August, 2005.

_____
MARY GRACE DIEHL
UNITED STATES BANKRUPTCY JUDGE

[8]Debtor, in the Supplemental Memorandum also asserts that the Settlement Agreement is not binding on Debtor because it violates the Georgia Statute of Frauds since it cannot be performed within one year. The Court is not persuaded by this argument since the June 17, 2005 Consent Judgment holding the $32,000 debt to be non-dischargeable was reduced to writing and executed by Debtor's attorney of record. Additionally, the Court considers Plaintiff's recitation of law to be accurate. In Georgia the case law is clear that in order to be violation of the statute of frauds an agreement must be incapable of being performed within one year. *See Bibb Distrib. Co. v. Stewart*, 238 Ga. App. 650, 654 (1999). In the instant case, the possibility of Debtor satisfying the obligation within one year was a contingency specifically addressed by the parties.

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